IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

EDWARD SCHLECTER,

Petitioner,

—against—

JOHN F. FOSTER, Warden of Auburn Prison, at Auburn, New York,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of Mr. Justice Gilbert, in the court of first instance, will be found at page 27 of the record. No opinion was rendered by the Appellate Courts.

Jurisdiction

The determination of the Appellate Division of the Supreme Court of the State of New York, Fourth Department, was rendered on the 14th of March, 1945. The Court of Appeals denied the petitioner's application for leave to appeal on June 7, 1945. The time for submission of this petition has been extended to October 7, 1945 by order of Mr. Justice Reed, dated August 29, 1945.

The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code (28 U. S. C. A. Sec. 344).

Statutes Involved

The statutory provisions of the Penal Law of the State of New York upon which the procedure now under attack was predicated, are Sections 408, 1941, 1942 and 1943 of the said Penal Law. Insofar as they are material to the questions of law here raised, they are set forth in the petition.

Statement of the Case

A summary statement of the case, and of the issues here presented, are set forth in the petition.

ARGUMENT

The procedure here under attack by the petitioner, has been sanctioned by the Court of Appeals in *People* v. *Coleman* and *People* v. *Heath* (264 N. Y. 536) affirming without opinion (240 Appellate Division 947). Two justices of the Appellate Division dissented. In an earlier decision in these cases (*People* v. *Heath*, 237 App. Div. 209, *People* v. *Coleman*, 237 App. Div. 211) Mr. Justice Martin, in his dissent, asserted that for the purpose of imposing punishment, the prior conviction of the defendant has spent its force, when used for the purpose of raising the offense from a misdemeanor to a felony.

> "Having been so used for that purpose, it would be equivalent to subjecting the defendant to double jeopardy if it were used a second time with a view of increasing the defendant's punishment again by charging him, in effect, with being a second offender under section 1941 of the Penal Law."

The validity of prior offender statutes, and the procedure for increasing punishment by information filed against the

accused, has been before this Court in *Graham* v. *West Virginia* (224 U. S. 616, 32 S. Ct. 583, 56 L. Ed. 917). This Court said (224 U. S. p. 626, 32 S. Ct. 586):

> "It is to prevent such a frustration of its policy '(referring to unknown prior convictions)' that provision is made for alternative methods; either by alleging the fact of prior conviction in the indictment and showing it upon the trial, or by a subsequent proceeding in which the identity of the prisoner may be ascertained and he may be sentenced to the full punishment fixed by law."

The same point was adjudicated with respect to a similar statute in the State of Massachusetts. *Plumbly* v. *Commonwealth*, 2 Metc. (43 Mass.) 413 and *Commonwealth* v. *Phillips*, 11 Pick (28 Mass.) 28. In the former decision, the Court pointed out that the methods provided by law for punishment of prior offenders, were in the alternative—either by charging the prior offense in the indictment, or by an information in legal form (2 Metc. (43 Mass.) 415, 416). Said the Court:

> "Both cannot be pursued, to obtain one and the same object; and as the conviction must by necessity be first in time, if the former convictions are then proceeded upon, it necessarily supersedes the other. Nothing remains for an information to reach."

Indeed, that the purposes of the so-called "Baumes Acts" (Sections 1941, 1942, 1943 of the Penal Law, *supra*) were intended to conform to the principle of alternative, and not cumulative, punishments, may be gathered from the report of the committee responsible for its enactment (Report of the Joint Legislative Committee on the co-ordination of civil and criminal practice acts (Baumes Committee Report,

N. Y. Legis. Doc. 1926, vol. 17, No. 84, p. 22). It may be further concluded from the opinion of the Court of Appeals in *People* v. *Gowasky*, 244 New York at page 460.

Nevertheless, we are here presented with a situation wherein a previous conviction of the petitioner, is utilized to increase the degree of crime and punishment therefor, from a misdemeanor to a felony; thereafter, it is again utilized, to enable the prosecutor to accumulate four convictions, and to sentence him to a maximum term in prison for his natural life.

A. The petitioner has been deprived of his liberty without due process of law.

B. The petitioner has been placed twice in jeopardy for the same offense.

For the reasons stated herein, and in the petition, the application for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.

JAY A. GILMAN,
Of Counsel.